

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

CASE NO.: 2:23-cv-01495-JHC

**PLAINTIFFS' RESPONSE TO
MOTION OF AMERICAN
BOOKSELLERS ASS'N TO
INTERVENE**

NOTE ON MOTION CALENDAR:
May 31, 2024

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INTRODUCTION

The American Booksellers Association, Inc. (the “ABA”) may well have legitimate claims against Defendant Amazon.com, Inc. (“Amazon” or “Defendant”). But its claims are different from those in this case, and the ABA’s Motion to Intervene (Dkt. #205) (the “ABA Motion”) does not meet the standards of Federal Rule of Civil Procedure 24 (“Rule 24”). This rule is designed to allow parties with protectable legal interests in a pending litigation to participate in that case before a court makes decisions that could prejudice those interests. That is not the situation here. The ABA’s proposed intervention would do no such thing; instead, it would essentially create a “whole new suit.” *Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). Moreover, interpolating the ABA’s additional issues into this litigation would inject potential delay and frustrate the public interest in the prompt resolution of government antitrust claims.

The ABA’s request to intervene does not meet the standards for either intervention as of right or permissive intervention. First, relevant to both types of intervention, the ABA seeks to impermissibly add new and tangential issues. Second, the ABA does not have a protectable interest in this case as required for intervention as of right. Third, the ABA’s request to permissively intervene should be denied because its claims do not raise common questions with those already in this case, and the discretionary factors weigh against permitting intervention, most importantly because intervention would prejudice the existing parties. Plaintiffs do not, however, oppose the ABA’s alternative request to participate as an amicus curiae on particular motions or issues, should that assist the Court.

BACKGROUND

The ABA seeks to intervene based on claims that Amazon “used [its monopsony power] to impose lower but discriminatory wholesale book prices for itself, thereby restraining

1 competition by ABA members [i.e., independent booksellers]” in the market for the sale of
 2 books. ABA Motion at 3. The ABA alleges that Amazon’s lower wholesale costs have allowed it
 3 “to sell books to retail customers at prices that ABA members cannot match.” *Id.* at 2.

4 Plaintiffs’ claims here are different. Plaintiffs allege that Amazon monopolized two other
 5 markets—the “online superstore market” (where shoppers can satisfy most of their online
 6 shopping needs) and the “market for online marketplace services” (where sellers can reach many
 7 shoppers with their products). Am. Compl. ¶ 119 (Dkt. #170). While books are sold in online
 8 superstores, books only make up a sliver of these markets, which include products ranging from
 9 electronics to clothing and sporting goods. *See id.* ¶ 126 (“An online superstore offers an
 10 extensive breadth and depth of product selection accessible through an online storefront.
 11 ‘Breadth’ refers to product offerings across multiple categories, such as sporting goods, kitchen
 12 goods, apparel, and consumer electronics.”). Plaintiffs challenge Amazon’s course of conduct
 13 that denies other online superstores and marketplace service providers the scale they need to
 14 compete effectively, maintaining Amazon’s monopoly power in these markets and harming
 15 shoppers and sellers. Unlike the ABA, Plaintiffs’ Amended Complaint does not reference
 16 Amazon’s monopsony power in any market.

17 LEGAL STANDARD

18 Rule 24 provides for two types of intervention: intervention as of right under Rule 24(a)
 19 and permissive intervention under Rule 24(b). For both types of intervention, the proposed
 20 intervenor cannot “enlarge th[e] issues” or “compel an alteration of the nature of the
 21 proceeding.” *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944); *see also Seminole*
 22 *Nation of Oklahoma v. Norton*, 206 F.R.D. 1, 7-8 (D.D.C. 2001) (denying motion to intervene
 23 under Rule 24(a) and Rule 24(b) for claims that would improperly raise new issues); *United*
 24 *States v. Blue Lake Power*, 215 F. Supp. 3d 838, 844 (N.D. Cal. 2016) (denying intervention on

new issues where intervenor’s proposed “claims would require litigation of entirely different and hitherto untouched facts, questions of law, and remedies . . .”). Allowing intervention for tangential matters “would prejudice the other parties by expanding [the] litigation far beyond the original question presented and caus[e] substantial delay in the resolution of [the] case.” *City of Jersey City v. Consol. Rail Corp.*, 968 F. Supp. 2d 302, 306 (D.D.C. 2013), *aff’d*, No. 13-7175, 2014 WL 1378306 (D.C. Cir. Feb. 19, 2014).

To intervene as of right under Rule 24(a)(2),¹ the proposed intervenor must show: (1) that it has an interest in the litigation that is “protectable under some law” and (2) that “there is a relationship between the legally protected interest and the claims at issue.” *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (internal quotation marks omitted). The proposed intervenor must also show that “the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest.” *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). A proposed intervenor must do more than claim that the “two inquiries are similar.” *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). Rather, a ruling in the original case must actually risk prejudice to the proposed intervenor’s rights. *See id.*

For permissive intervention under Rule 24(b)(1)(B),² the proposed intervenor must show that it “has a claim or defense that shares with the main action a common question of law or fact.” If so, Rule 24(b)(3) requires the Court to consider “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *See S. Dakota ex rel. Barnett v. U.S. Dep’t of Interior*, 317 F.3d 783, 787 (8th Cir. 2003) (“The principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or

¹ The ABA does not seek to intervene under Rule 24(a)(1).

² The ABA does not seek to intervene under Rule 24(b)(1)(A) or 24(b)(2).

prejudice the adjudication of the parties’ rights.”); *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 415 (N.D. Cal. 2004) (same). The Court may consider additional factors if the prerequisite common question is found, including whether the proposed intervenor could bring a separate case. *See Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (listing potentially relevant factors); *UMG Recordings*, 222 F.R.D. at 415 (denying a motion to intervene because, in part, the proposed intervenor could still bring its own case).

ARGUMENT

The Court should deny the ABA’s request to intervene in this case. First, whether seeking to intervene as of right or at the Court’s discretion, proposed intervenors can only raise issues that that “ha[ve] been brought before the court by another party,” and the ABA’s claims, which concern different markets and different conduct, go well beyond the issues already raised by Plaintiffs. *Seminole Nation*, 206 F.R.D. at 7 (quoting *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)). Likewise, the ABA’s attempt to expand the scope of this case fails to meet the specific standards for either mandatory or permissive intervention. The ABA is not entitled to intervention as of right because it does not have a protectable interest in this litigation and, even if it did, it has not shown a “relationship between the legally protected interest and the claims at issue.” *Nw. Forest*, 82 F.3d at 837. Similarly, permissive intervention is not merited because the ABA’s claims do not share a common question with Plaintiffs’ claims, *see Greene*, 996 F.2d at 978, and because intervention would significantly delay the proceedings, frustrating the significant public interest in the prompt resolution of antitrust suits, *see UMG Recordings*, 222 F.R.D. at 415.

I. THE ABA’S PROPOSED INTERVENTION WOULD IMPERMISSIBLY EXPAND THE SCOPE OF THIS CASE BY ADDING NEW ISSUES.

The ABA’s claims are, at most, tangential to Plaintiffs’ claims here, involving different conduct in different markets. The ABA alleges that Amazon possesses monopsony and monopoly power in a market for books, and that it obtains discriminatory pricing discounts that are unlawful under the Robinson-Patman Act and therefore also violates the Sherman Act. ABA Motion at 3-4; *see also* 15 U.S.C. § 2; 15 U.S.C. § 13. By contrast, Plaintiffs’ claims focus on Amazon’s monopoly maintenance in the online superstore market and in the online marketplace services market, as well as its unfair methods of competition. These claims are raised under not only the Sherman Act but also the Federal Trade Commission Act and the laws of twelve Plaintiff States. Plaintiffs do not separately allege any market for books, do not reference booksellers, do not allege that Amazon has monopsony power in any market, and do not advance any claims—even indirectly—grounded in the Robinson-Patman Act. *See ABA Files Motion to Intervene in the FTC’s Suit Against Amazon*, American Booksellers Ass’n (May 1, 2024), <https://www.bookweb.org/news/aba-files-motion-intervene-ftcs-suit-against-amazon-1630556> (“Notably missing from [Plaintiffs’] complaint, however, are independent bookstores.”).

The factual and legal questions that the Court would need to resolve for Plaintiffs’ claims and the ABA’s claims are different. For example, the ABA characterizes its relevant market for books as a “submarket” of Plaintiffs’ online superstore market. ABA Motion at 3, 5. However, to show that Amazon has monopsony power in a book market, the ABA would likely address who purchases books from publishers at wholesale prices and in what quantities. In contrast, the Complaint alleges that Amazon has monopoly power in the market of online superstores, which “compete to build long-term relationships with consumers across multiple purchases *of a variety of items . . . by offering a distinct set of features*” that encourage shoppers “to return to those

1 online superstores for a *broad swath of goods*.” Am. Compl. ¶ 124 (emphases added). For these
2 reasons, “online stores with a more limited selection”—such as booksellers—“are not reasonably
3 interchangeable with online superstores for the same purposes and are thus properly excluded
4 from the online superstore market.” *Id.*; *see also id.* ¶¶ 126-41 (describing unique attributes of
5 online superstore market).

6 Likewise, the ABA characterizes its allegations regarding Amazon’s scheme of obtaining
7 discriminatory wholesale discounts as “fully consistent with Plaintiffs’ Complaint” and “an
8 important instance of Amazon’s exclusionary conduct.” ABA Motion at 5. However, to
9 determine whether Amazon obtains discriminatory prices from book publishers, the ABA would
10 presumably inquire into the pricing offered on various book titles to different purchasers at the
11 same times. To assess the impact of those differential prices on competition in book retailing, the
12 ABA would then likely present evidence on the nature of competition in the retail sale of books.
13 None of that evidence is likely to be relevant to Plaintiffs’ claims that Amazon has monopoly
14 power in the online superstore and online marketplace services markets. *See* Am. Compl. ¶¶ 126-
15 41, 190-92 (describing unique attributes of the online superstore and online marketplace services
16 markets). Nor would that evidence be relevant to Plaintiffs’ allegations that Amazon’s conduct
17 suppressed competition by depriving rival online superstores and marketplaces of scale, harming
18 shoppers and Amazon sellers. *See id.* ¶ 7 (“Amazon uses a set of anti-discounting tactics to
19 prevent rivals from growing by offering lower prices, and it uses coercive tactics involving its
20 order fulfillment service to prevent rivals from gaining the scale they need to meaningfully
21 compete.”).

1 Allowing the ABA to insert their new issues into this case would “expand[] this litigation
2 far beyond the original question presented and caus[e] substantial delay in the resolution of this
3 case.” *City of Jersey City*, 968 F. Supp. 2d at 302.

4 **II. THE ABA IS NOT ENTITLED TO INTERVENTION AS OF RIGHT BECAUSE**
5 **IT DOES NOT HAVE AN INTEREST IN THIS CASE THAT COULD BE**
6 **PREJUDICED.**

7 The ABA’s claimed interest in this case—stare decisis—does not justify intervention as
8 of right. ABA Motion at 8. The ABA’s motion does not identify any specific potential findings
9 in this case that would operate against its claims, which is unsurprising given the significant
10 differences between Plaintiffs’ and the ABA’s claims. Even if Plaintiffs’ claims had some stare
11 decisis implications for the ABA’s claims—and they do not—these would not be sufficient to
12 constitute a Rule 24(a) interest under applicable precedents, particularly at this stage of the
13 litigation.

14 **A. The ABA Does Not Have a Protectable Interest in this Case.**

15 The ABA does not have a protectable interest in this case because its interests are not
16 “relat[ed] . . . to the [P]laintiff[s]’ claims.” *Donnelly*, 159 F.3d at 409. The only real similarities
17 between its claims and Plaintiffs’ are that they involve the same defendant and, in part, the same
18 statute. However, the underlying wrongful conduct is entirely different and was directed at
19 different markets. *Donnelly* is directly on point, and the ABA’s proposed intervention fails for
20 the same reasons. There, a putative class of female employees brought claims alleging a hostile
21 work environment. *Id.* at 407-08. A group of four male employees moved to intervene to add
22 their own claims of gender-based discrimination against the same defendants. *Id.* at 408. The
23 Ninth Circuit held that intervention was properly rejected because “the[] claims of discrimination
24 against male employees are unrelated to plaintiffs’ particular claims of ‘hostile-work-

environment’ discrimination against female employees. It is not enough that both groups assert discrimination claims against the same defendants.” *Id.* at 409. The proposed intervenors’ claims were not related to the plaintiffs’ claims even though they were against the same defendants, under the same statutes. The Ninth Circuit also held that “[r]esolution of plaintiffs’ action, therefore, will not affect the proposed intervenors’ claims.” *Id.* at 410. And, as in *Donnelly*, resolution of Plaintiffs’ claims is unlikely to “affect the proposed intervenor’s claims,” for the reasons discussed above. *Id.*; *see supra* at 5-7.

B. Any Findings in this Case Would Not Prejudice the ABA.

The ABA’s sole claimed prejudice that may arise from this case is the risk of adverse precedent that may prejudice its future claims. *See* ABA Motion at 8. However, in *Greene*, the Ninth Circuit made clear that any “interest in preserving the favorable effects of *stare decisis*” cannot be “too speculative.” *Greene*, 996 F.2d at 977. There, the court rejected the claimed precedential concerns where any rulings in the litigation would not directly affect the proposed intervenor’s claims. *Id.*; *see also N. Cal. River Watch v. Fluor Corp.*, No. 10-cv-05105-MEJ, 2014 WL 3385287, at *17 (N.D. Cal. July 9, 2014) (“[The proposed intervenor] seeks to assert seven additional state law claims that [plaintiff] has not asserted. A ruling by this Court would not have a precedential effect on any of these state law issues.”). The same is true here, where the ABA has not identified any specific potential holdings in this case that would prejudice its claims, especially as it seeks to litigate different theories of harm arising in different markets.

Furthermore, even if this case may result in precedent that would affect the ABA’s claims, such precedent would not be sufficient to afford the ABA the requisite interest justifying intervention. Even where there is some potential *stare decisis* implication, courts have not treated this as sufficient by itself for granting intervention as of right. “If *stare decisis* were the sole

1 criteria under Rule 24(a)(2), there would be an intervention free for all. Any person whose
 2 interests might be impaired or impeded by an adverse decision in an unrelated litigation could
 3 intervene as of right.” *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 550 B.R. 241,
 4 250 (Bankr. S.D.N.Y. 2016). The ABA identifies no case in which stare decisis concerns,
 5 standing alone, were sufficient to constitute an “interest” warranting intervention. It principally
 6 relies on *United States v. Oregon*, 839 F.2d 635 (9th Cir. 1988), in which the court referred to
 7 stare decisis as an “important consideration” supporting intervention. But even there, the court
 8 found a “[m]ore important” consideration supporting intervention: the fact that the intervenor
 9 and the original plaintiffs would be in conflict for a common fund. *Id.* at 638 (“[T]his record
 10 shows as a practical matter that this litigation may impair appellants’ ability to obtain effective
 11 remedies in later litigation if the trial court is not allowed to consider the appellants’ contentions
 12 here.”); *see also id.* at 637 (“There is also no question that the applicants have an interest relating
 13 to the facility which is the subject of the action.”). Unlike the intervenors in *Oregon*, the ABA
 14 makes no showing here that any findings in this case would impair its ability to seek relief.

15 The advisory committee notes illustrate what types of interests are contemplated by Rule
 16 24(a). The two forms specifically identified in the advisory committee’s note to the 1966
 17 amendment³ are “where an action is being prosecuted or defended by a trustee, a beneficiary of
 18 the trust should have a right to intervene” and where “a member of a class should have the right
 19 to intervene in a class action.” Fed. R. Civ. P. 24(a)(2) advisory committee’s note to 1966
 20 amendment. While these examples are not exhaustive, they do indicate that the rules contemplate
 21 an interest far beyond some generalized risk of adverse precedent, and instead require a concrete

22
 23
 24 ³ Rule 24(a) has not been substantively changed since these notes.

1 stake in the matter as it stands. The ABA has no such interest, and thus should not be allowed to
 2 intervene under Rule 24(a)(2).⁴

3 **III. PERMISSIVE INTERVENTION IS NOT WARRANTED AS THE ABA’S**
 4 **CLAIMS DO NOT INVOLVE COMMON QUESTIONS, AND INTERVENTION**
 5 **WOULD PREJUDICE THE PARTIES.**

6 In the alternative, the ABA seeks to intervene under Rule 24(b)(1)(B), which allows
 7 permissive intervention for anyone who “has a claim or defense that shares with the main action
 8 a common question of law or fact.” The ABA has not identified any common questions with
 9 Plaintiffs’ claims. Furthermore, even if a common question were present, the Court should use its
 10 discretion to deny the ABA’s request to intervene because intervention would slow the progress
 11 of this case while denying intervention would not limit the ABA’s ability to seek relief on its
 12 own.

13 **A. The ABA Does Not Raise Common Questions.**

14 As discussed above, the ABA is bringing claims for different conduct in different markets
 15 from Plaintiffs. Where the claims in a litigation are substantially unrelated to those the proposed
 16 intervenor seeks to add, there is no common question under Rule 24(b). *See Marvel Ent. Grp.,*
 17 *Inc. v. Hawaiian Triathlon Corp.*, 132 F.R.D. 143, 146 (S.D.N.Y. 1990) (“Although it is true that
 18 there is some overlap in the legal and factual issues [intervenor] seeks to litigate, [intervenor]
 19 also seeks to assert additional unrelated claims . . . which would needlessly expand the scope and
 20

21 ⁴ Even if there were some factual overlaps between the ABA’s and Plaintiffs’ claims, this does not mean stare
 22 decisis concerns would arise. Especially at this stage of the case, there is no risk of any binding precedent that would
 23 prejudice the ABA. As courts have noted in denying motions for intervention as of right: “A decision of a federal
 24 district court judge is not binding precedent in either a different judicial district, the same judicial district, or even
 upon the same judge in a different case.” *Doe v. Horne*, No. 23-cv-00185-TUC-JGZ, 2023 WL 6979469, at *4 (D.
 Ariz. Oct. 23, 2023) (internal quotations omitted); *Seneca Res. Corp. v. Twp. of Highland*, 863 F.3d 245, 257 (3d
 Cir. 2017) (same). In the absence of any risk of binding precedent, there is not sufficient potential prejudice to
 warrant intervention under Rule 24(a).

costs of this litigation and would thus prejudice the rights of [the current parties] to the expeditious resolution of this action.”⁵

Courts deny intervention in these circumstances. For example, the Ninth Circuit has held that, where the proposed intervenor seeks to raise issues “unrelated to the subject matter of the [underlying] action,” permissive intervention is inappropriate. *Mishewal Wappo Tribe of Alexander Valley v. Salazar*, 534 F. App’x 665, 668 (9th Cir. 2013); *see also Greene*, 996 F.2d at 978; *Sch. Dist. of Philadelphia v. Pennsylvania Milk Mktg. Bd.*, 160 F.R.D. 66, 69 (E.D. Pa. 1995) (denying motion to intervene where existing defendants sought to protect prices paid by school district to milk dealers while proposed intervenor sought to protect prices paid by dealers to dairy farmers). The same analysis applies here—while the ABA may support Plaintiffs, that is insufficient. The ABA has not shown that its legal theories actually overlap with those of Plaintiffs.

B. The ABA’s Proposed Intervention Will Slow the Progress of this Case, Contrary to the Public Interest in the Speedy Resolution of Government Enforcement Actions.

Finally, even if there were a common question, allowing the ABA to intervene would delay the progress of this case and prejudice the parties. *See* Fed. R. Civ. P. 24(b)(3) (“In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.”). This is particularly true here, as courts

⁵ Rule 24(c) requires a proposed intervenor to submit a “pleading that sets out the claim or defense for which intervention is sought,” which the ABA did not do. The ABA argues it does not need to provide a pleading under *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009). ABA Motion at 3 n.4. However, *Westchester* made clear a formal pleading was not needed where the parties were already “apprised of the grounds for the motion.” *Westchester*, 585 F.3d at 1188 (quoting *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992)). This is not the case here given the ABA’s claims significantly differ, e.g., they bring suit for different conduct in different markets. *See Ironshore Indem. Inc. v. Kay*, No. 2:21-cv-01706-JAD, 2022 WL 293230, at *6 (D. Nev. Feb. 1, 2022) (“[The proposed intervenor’s] failure to file a proposed pleading prevents me from determining how those distinct rights and claims relate to the pending action.”).

1 have repeatedly emphasized “Congress’s clear intent to prioritize speedy and efficient resolution
2 of government antitrust suits.” *United States v. Google LLC*, 661 F. Supp. 3d 480, 493 (E.D. Va.
3 2023); *FTC v. Vyera Pharms., LLC*, 20-cv-00706-DLC, 2021 WL 76336, at *1 (S.D.N.Y. Jan. 8,
4 2021) (same). Allowing the ABA to intervene and potentially delay the case would frustrate this
5 public interest.

6 Courts have consistently held that intervention should be denied where it would add
7 collateral issues that would delay the outcome of the pending matter, including under Rule
8 24(b)(1)(B). *See, e.g., FTC v. First Cap. Consumer Membership Servs., Inc.*, 206 F.R.D. 358,
9 366 (W.D.N.Y. 2001) (“[T]he case law is clear that if an intervenor attempts to introduce
10 collateral issues in a proceeding, a court may be justified in denying a motion to intervene based
11 on undue delay or prejudice.”); *UMG Recordings*, 222 F.R.D. at 415 (denying motion to
12 intervene where proposed intervention “threatens to prejudice plaintiff by forcing it to defend
13 against collateral actions.”); *Sellers v. United States*, 709 F.2d 1469, 1472 (11th Cir. 1983)
14 (affirming denial of motion to intervene because “[t]he intervention proposed would have
15 expanded this litigation to include [new] disputes.”). Beyond the substantial discovery already
16 underway, the ABA and Amazon would presumably need to seek extensive additional discovery
17 regarding book distribution, likely including discovery from ABA-member booksellers and
18 publishers. Expanding the scope of discovery would potentially result in significant delays to the
19 case schedule.

20 On the other hand, denying the ABA’s request to intervene would still leave the ABA a
21 viable alternative path forward—bringing its own case. *See UMG Recordings*, 222 F.R.D. at 415
22 (“[Proposed Intervenor’s] ability to pursue its claims through an alternative mechanism without
23 any prejudice to its own rights is significant in the context of a motion to intervene brought by
24

that party.”). The ABA is free to file its own case against Amazon, as other private plaintiffs have.

CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court deny the ABA’s request to intervene in this case. The ABA seeks, in the alternative, to participate as an amicus curiae. Plaintiffs do not oppose this alternative request.

Dated: May 23, 2024

I certify that this brief contains 3,958 words, in compliance with LCR 7(e)(4).

Respectfully submitted,

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